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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 740

T. O. BRADBURY AND N. B. BURT,

Petitioners,

vs.

FRANK DENNIS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on October 15, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix B. The Order of the District Court is printed in Appendix A.

JURISDICTION

The Court of Appeals judgment was entered October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Within the meaning of 28 U.S.C. §1359, is an assignment of a claim by a Colorado corporation to an Oklahoma Citizen improperly or collusively made to invoke the jurisdiction of the District Court when, without such assignment, there is no diversity of citizenship, and when:

(a) The assignment was made by the corporation to its sole stockholder;

(b) The assignment was without present consideration;

(c) The assigning corporation was insolvent;

(d) The subject matter of the assignment consisted of an alleged claim for usury, which claim constituted the only asset of the corporation;

(e) The assignment was void under the substantive law of Colorado; and,

(f) The assignment was subject to attack and could be set aside by corporate creditors?

2. Is the test of jurisdiction that announced by the Court of Appeals for the Tenth Circuit; namely, that jurisdiction will be upheld when founded on an assignment void under state law unless "it would operate to serve a purpose which is unsuited to the good order of federal court administration?"

STATUTE INVOLVED

The statutory provision in question is 28 U.S.C. §1359:

"A district court shall not have jurisdiction of a civil

action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

STATEMENT OF THE CASE

Jurisdiction purports to be founded on diversity of citizenship. Plaintiff, a citizen of Oklahoma, is the assignee of a claim for usury said to have been charged by defendants, Colorado citizens, to plaintiff's assignor, the D. M. & E. Construction Company, Inc., a Colorado corporation (R. 3). In the absence of a valid assignment there is no diversity of citizenship.

Defendants challenged jurisdiction on the ground that the assignment was "improper or collusive" within the meaning of 28 U.S.C. §1359. The trial court upheld its jurisdiction, but certified its determination for interlocutory appeal under 28 U.S.C. §1292 (b), and the Court of Appeals for the Tenth Circuit permitted the appeal (R. 1). The trial court's decision was affirmed (App. B).

The record shows that plaintiff is the corporation's sole stockholder (R. 46). An assignment was executed by the corporation, purporting to assign to plaintiff all claims and demands which the corporation had against defendants (R.12). At that time, the corporation was insolvent, although plaintiff had either paid or had orally promised to pay many of the corporation's debts (R. 38).

There are no corporate minutes showing that the assignment was authorized by the board of directors, nor are there any minutes authorizing distribution of its assets in liquidation (App. A). The only minutes relied upon by plaintiff are back-dated minutes, hastily prepared during a recess in the trial court hearing, which purport to ratify past acts of the corporate directors and officers (R. 59). The claim is not reflected in the financial records of the corporation, and no entry was made in the corporate books showing the alleged assignment (R. 56-57).

When the claim was assigned to its sole stockholder without present consideration, the company was insolvent, and the claim was the corporation's only asset (R. 38).

Colorado law prohibits liquidation of an insolvent corporation, but the trial court concluded, "although the assignment might be voidable upon an attack thereon by the creditors of the corporation, that fact does not, as a matter of law, make the assignment either improper or collusive within the meaning of Title 28, United States Code, Sec. 1359, nor does it prevent the plaintiff from maintaining the action under the assignment" (R. 3).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Tenth Circuit conflicts with the decision of this Court in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, where the former statute was construed, and where it was held that, an assignment is sufficiently tainted with illegality to permit an attack on it by third persons, the assignment is "collusive or improper" for jurisdictional purposes.

2. 28 U.S.C. §1359, has never been construed by this Court, but identical language in former statutes has been said by this Court to have a meaning diametrically opposed to the meaning attributed to the same language by the Tenth Circuit.

3. The Court of Appeals for the Tenth Circuit has upheld jurisdiction when in fact Congress has expressly denied jurisdiction to the federal courts if the alleged diversity of citizenship rests on a collusive or improper assignment.

4. Where heretofore it has been held uniformly that federal court jurisdiction must be expressly conferred by Congress and that such jurisdiction must clearly appear, the Court of Appeals for the Tenth Circuit has opened a Pandora's box by holding that in a diversity case stemming

from an assignment, the test of jurisdiction is whether trial of the case "would operate to serve a purpose which is unsuited to the good order of federal court administration." If now, for the first time, "the good order of federal court administration" is the test of jurisdiction, this case is the most sweeping decision of our generation, and it will revolutionize long accepted concepts as to the jurisdiction of the United States District Courts. Any case can now be litigated in the federal courts if the jurisdictional amount is involved, because, if this assignment is neither collusive nor improper, those words are meaningless.

ARGUMENT

The Court of Appeals for the Tenth Circuit held that an assignment which may be set aside by third-party creditors under state law is neither collusive nor improper within the meaning of 28 U.S.C. §1359. In *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, this Court reached the exact opposite conclusion under an earlier statute which used language identical with that construed by the Tenth Circuit. This Court's decision in *Lehigh* was followed in *Miller & Lux v. East Side Canal & Irrig. Co.*, 211 U.S. 293.

The Tenth Circuit distinguished these two cases by misreading *Black & White Taxi Co. v. Brown and Yellow Taxi Co.*, 276 U.S. 518, which held that an assignment which was not subject to attack by anyone would be recognized for jurisdictional purposes. The opinion of the Court of Appeals fails to recognize that the facts of this case fit squarely within the rule applied in *Lehigh* and *Miller & Lux*, and that the facts here do not even approach the distinguishing feature of *Black & White*. Here, the assignment was and is subject to attack by third-party creditors, just as in *Lehigh* the assignment was subject to attack by third-party stockholders. This, we think, is the true distinction between *Black & White* and *Lehigh*, and, on the record here presented, *Lehigh* controls.

The Tenth Circuit applied its own distinction, but if that distinction be correct, the conclusion of the Court of Appeals is a perfect non sequitur. The Court said (App. B):

> "The obvious distinction lies in the fact that in Lehigh and Miller & Lux, the resident corporation remained in existence, and in full control of the foreign corporation, while in the Taxi case, the resident corporation was dissolved."

If that be the "obvious distinction", the assignment here was manifestly "collusive or improper", because, (1) the Colorado corporation is still in existence, and (2) the assignee is in complete control of it.

The case is one of first impression with this Court as to the meaning of 28 U.S.C. §1359, but, as we have seen, this Court has heretofore spelled out the meaning of identical language contained in former 28 U.S.C. §80. Prior to 1948, an assignment could not confer jurisdiction unless jurisdiction would have existed without the assignment (former 28 U.S.C. 41 (1)). Moreover, prior to the enactment of the present law, old Sec. 80 prohibited jurisdiction if "the parties to said suit have been improperly or collusively made or joined." The enactment of 28 U.S.C. §1359 permitted jurisdiction in instances where there was no diversity between assignor and defendant if the requisite diversity existed between assignee and defendant. But Congress carefully incorporated into the new law the language contained in old 28 U.S.C. §80, and the prohibition against jurisdiction founded upon improper or collusive assignments was left in the law.

Congress incorporated this language in the statute with a full awareness of the settled law announced in *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327. There a Virginia corporation conveyed all of its assets to the Lehigh Co., a Pennsylvania corporation, without consideration. The conveyance was held to be "collusive or im-

proper" with the meaning of the then controlling 28 U.S.C. §80. This Court held that the conveyance was tainted with illegality, and that since third persons, not parties to the lawsuit, could set aside the transfer, the conveyance was sufficiently improper to defeat jurisdiction. Congress intended that this restriction continue when it enacted 28 U.S.C. §1359 in exactly the same words used in the earlier Act which had been construed by this Court.

Since the transfer under consideration in *Miller & Lux v. East Side Canal & Irr. Co.*, 211 U.S. 283, could be attacked by third persons, jurisdiction was denied in that case, and the rule of *Lehigh* was applied. However, in *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, the assignment was upheld for jurisdictional purposes, because in that case the assignment was untainted, and no one could attack its validity. The Tenth Circuit notices that in *Black & White* the corporation was dissolved, but if, as the Tenth Circuit says, this is the ground for distinction, the applicability of the rule of *Lehigh* here is inescapable, because our corporation is still alive, and it is controlled by plaintiff.

We have here an assignment by an insolvent corporation to the corporation's sole stockholder. This assignment was prohibited by Colorado statute. Colorado Revised Statutes, 1953, 31-31-11 provide:

> "Distribution in partial liquidation—(1) (a) The Board of Directors of a corporation may, from time to time, distribute to its shareholders in partial liquidation, out of stated capital or capital surplus of the corporation, a portion of its assets in cash or property, subject to the following provisions: . . . "(b) No such distribution shall be made at a time when the corporation is insolvent or when such distribution would render the corporation insolvent."

That this assignment was illegal under Colorado law is settled by *Laybourn v. Wrape*, 72 Colo. 339, 211 Pac. 367,

and that plaintiff failed to show that the assignment was not in partial liquidation is a fact found by the trial court (R. 2-3). Since there is a presumption against jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, the illegality of this assignment must be and it was recognized by both the trial court and the Court of Appeals for the Tenth Circuit. The assignment being illegal under state law, it was subject to attack by third-party creditors of the still existent assigning corporation. Thus, whatever distinction is applied to *Lehigh* and *Black & White*, there is no federal court jurisdiction of this claim.

The Court of Appeals commented at the outset of its opinion (App. B):

> "Our difficult problem is one of ascertaining their true jurisdictional meaning at the time of the revision. As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the decisional gray zone . . . . ."

At the end of its opinion, we find no light thrown on the subject, because the Court said (App. B):

> "All this means that the state of the law is left in the gray zone where we found it. Certainly no rule of thumb is suggested or stated. But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration."

The Court of Appeals for the Tenth Circuit, then, has said that when jurisdiction is attacked, the trial court should accept or reject jurisdiction dependent upon its belief as to whether trying the case would be "unsuited to the good order of federal court adminstration." The Tenth Circuit has made jurisdiction a matter of discretion, and no more sweeping change in the settled principles of our law can be imagined. Under this rule, a court with an

uncrowded docket may have jurisdiction, but on busier days, there is no jurisdiction. This court did not intend *Lehigh* and *Black and White* to be thus distinguished. Jurisdiction either exists or it doesn't. "The good order of federal court administration" has never before been a test of jurisdiction, and this meaning cannot be read into the earlier uniformly followed decisions of the Court. This revolutionary pronouncement of discretionary jurisdiction cries out for review on certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FRANK DENNIS,

Plaintiff,

vs.

T. O. BRADBURY and
N. B. BURT,

Defendants.

CIVIL NO. 6480

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for trial upon the defendants' separate defense that this court is without jurisdiction for the reason that the plaintiff sues as an assignee, and that the assignment has been improperly or collusively made to invoke the jurisdiction of this court contrary to Title 28, United States Code, §1359.

The Court heard the evidence, considered the briefs of the parties and the oral argument of counsel, and being duly advised does make the following

FINDINGS OF FACT

1. That plaintiff brings this action as an assignee of D. M. & E. Construction Company, Inc., a Colorado corporation with its principal place of business in the State of Colorado; that the plaintiff is a resident of the State of Oklahoma and the defendants are residents of the State of Colorado; that a diversity of citizenship exists between them; that the amount involved exceeds the sum of $10,000 excluding interest and costs; and that if this action were brought by D. M. & E. Construction Company, Inc., there would be no diversity of citizenship and this court would not have jurisdiction of this action.

2. The plaintiff, together with Mallon and Evans, was engaged in the acquisition and development of certain real estate in Arapahoe County, Colorado, as a partnership, the plaintiff Dennis furnishing the capital. At first the project was operated as a partnership. Later Evans withdrew, the D. M. & E. Construction Company, Inc. was incorporated, and the assets of the partnership were assigned to that corporation.

3. At the time of the transfer to the corporation, the corporation acknowledged its indebtedness to plaintiff Dennis in the amount of $117,295, to reimburse plaintiff for the advances originally made by the plaintiff in connection with the development.

4. Thereafter, the plaintiff acquired control of all of the capital stock of D. M. & E. Construction Company, Inc., and on February 28, 1959, the assignment in question was executed by the corporation, purporting to assign to the plaintiff Dennis all claims and demands which the corporation has or may have against the defendants.

5. At the time of the assignment, the corporation was insolvent but the plaintiff had either paid or orally promised to pay a substantial part of the corporation's indebtedness.

6. The minutes of the corporation do not show that the assignment was specifically authorized by any action of the board of directors prior to or at the time of the execution of the assignment, nor do the minutes of the corporation reflect any action authorizing a distribution of assets in liquidation of the corporation, nor do the minutes of the corporation indicate whether the assignment was executed in payment or part payment of the indebtedness due by the corporation to the plaintiff, or whether it was executed and delivered as a partial liquidation of the corporation. The minutes of the corporation make no mention of the assignment as such, and the only corporate

minutes on which plaintiff relies are back-dated minutes prepared during a recess between the hearings of this case purporting to ratify the acts of the directors and officers. The financial records of the corporation do not carry this claim as an asset, and the assignment is not reflected in the financial records of the company.

CONCLUSIONS OF LAW

The Court concludes as a matter of law that there was adequate consideration to support the assignment, whether the assignment was in payment or part payment of the indebtedness due the plaintiff, or whether it was a partial liquidation of the assets of the corporation.

The Court further concludes as a matter of law that the fact that the corporation was insolvent at the time of the assignment, or that the minutes do not reflect a specific grant of authority to the corporate officers to make the assignment, does not make the assignment either improper or void.

The Court further concludes as a matter of law that although the assignment might be voidable upon an attack thereon by the creditors of the corporation, that fact does not, as a matter of law, make the assignment either improper or collusive within the meaning of Title 28, United States Code, §1359, nor does it prevent the plaintiff from maintaining the action under the assignment.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court does have jurisdiction of this action.

It is the opinion of this Court that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immedi-

ate appeal from the order may materially advance the ultimate termination of the litigation.

IT IS THEREFORE ORDERED that if application for an appeal is made under the provisions of Title 28, §1292 (b) within the time therein provided, all proceedings in this court shall be stayed pending the disposition of the application for the appeal, and if the application is granted, the proceedings in the District Court shall be stayed until the disposition of the appeal.

DATED at Denver, Colorado, this 13th day of November, 1961.

BY THE COURT:
/s/ HATFIELD CHILSON
HATFIELD CHILSON, *Judge*
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM — 1962

T. O. BRADBURY and N. B. BURT;
Appellants,

vs.

FRANK DENNIS,
Appellee.

Number 6978

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Fred M. Winner (Emory L. O'Connell and Robert J. Enochs were with him on brief) for Appellants.

Clyde J. Watts (the Firm of Yegge, Hall & Schulenberg was with him on brief) for Appellee.

Before MURRAH, Chief Judge and PICKETT and HILL, Circuit Judges.

MURRAH, Chief Judge

This interlocutory appeal under Section 1292(b) Title 28 U.S.C., squarely presents the question of the trial court's diversity jurisdiction. It is contended that the

assignment of the asserted cause of action by a wholly owned resident corporation to its nonresident stockholder-plaintiff was "improperly or collusively" made to invoke federal court jurisdiction within the meaning of Section 1359, 28 U.S.C., which denies diversity jurisdiction in such cases.[1] The trial court sustained its diversity jurisdiction, but certified the question here as one as to which "there is substantial grounds for difference of opinion."

The complaint affirmatively asserts diversity of citizenship and requisite amount in controversy, and alleges in substance that by the challenged assignment of the asserted cause of action, the plaintiff-appellee merely acquired that which he already owned since he alone had provided the funds for payment of the usurious interest, which is the subject matter of this lawsuit.

If, as suggested, the appellee was the actual owner of the cause of action before the purported assignment, he was of course the real party in interest, and we have no occasion to consider the propriety of the assignment. Pursuant to a hearing to determine jurisdiction, the trial court found, and the record indicates, that the plaintiff and others entered into a partnership for the development of certain real estate in Colorado, the appellee advancing all of the partnership capital. The partnership entered into a contract with the appellants which provided for the payments now claimed to include usurious interest. The partnership organized a Colorado corporation and assigned all of the partnership assets to it, and the corporation assumed all of the partnership liabilities, including an indebtedness to the appellee for capital advancements to the partnership. Some of the payments made under the alleged usurious contract were made by the partnership and some by the corporation. After the appellee became the sole stockholder of the corporation, he caused it to execute the as-

[1] §1359. "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

signment in question, purporting to assign to him all claims and demands which the corporation had or might have against the appellants. At the time of the assignment, the corporation was insolvent, but the plaintiff had paid or orally promised to pay a substantial part of the corporation's indebtedness. It is thus plain that the appellee was not the sole owner of the asserted cause of action before the challenged assignment, and was not therefore the real party in interest.

This brings us to the question whether the assignment was "improperly or collusively" made within the meaning of Section 1359. We start with the presumption against diversity jurisdiction, and the burden is and always has been upon the one asserting it to affirmatively sustain it; and the court is under the duty to dismiss the action if at any stage of the proceeding it becomes apparent that jurisdiction is lacking. City of Lawton, Oklahoma v. Chapman, 257 F. 2d 601.

Originally, one section of the Judicial Code (§24(1), 36 Stat. 1091) specifically denied federal jurisdiction to an assignee of a cause of action if it was not available to his assignor. Sewell v. Federal Reserve Bank, 268 U.S. 449. Another section of the same Code (§37, 36 Stat. 1098) denied federal jurisdiction if, at any time after suit had been brought or removed to the federal court, it appeared that the parties to the suit had been "improperly or collusively made or joined * * * for the purpose of creating a case cognizable or removable * * *" to the federal court. The revisors of the 1948 Judicial Code conjoined the two sections to form Section 1359, under which diversity jurisdiction by assignment became conferrable provided it was not improperly or collusively made for that purpose. See Revisors' Note to 28 U.S.C. 1359; and Steinberg v. Toro, 95 F. Supp. 791. Indeed, the appellants freely concede as much.

The critical words "improperly or collusively", having

been imported from old Section 37 into the Revised Section 1359, we will assume that Congress intended for them to have the same meaning and connotation which had been given them at the time of incorporation into the Revised Code. Our difficult problem is one of ascertaining their true jurisdictional meaning at the time of the revision. As words used to delineate jurisdiction, they ought to be cast in black and white, but we find them in the decisional gray zone. Though words of general import, and no strangers to the law, they are nevertheless words of art when used to define or delineate federal court jurisdiction. They are used in the disjunctive and are evidently intended to define different and varying jurisdictional boundaries. Prerevision case law did not draw a distinction between the two, but was content to say that an assignment or transfer was not improper or collusive unless it could be said to be "fictitious or pretended", Miller & Lux, Inc. v. East Side Canal & Irrigation Co., 211 U.S. 293; or "feigned or merely colorable", B & W Taxi Co. v. B & Y Taxi Co., 276 U.S. 518; or for the purpose of creating a temporary or spurious citizenship, Amalgamated Clothing Workers v. Curlee Clothing Co., 19 F. 2d 439; Tower Realty Co. v. City of East Detroit, Mich., 185 F. 2d 590. It was enough that the assignee or transferee was the real party in interest. B & W Taxi Co. v. B & Y Taxi Co., supra. If we accept the dictionary definition, as did the Third Circuit, (i.e. Corabi v. Auto Racing, Inc., 264 F 2d 784, 75 A.L.R. 711) the word "improperly" broadly covers any act or conduct deemed unsuited to the circumstances of the case, while the word "collusively" is a stronger word with a more restricted meaning indicating a secret agreement for a bad purpose.

Particularly, we need to know by what standards we shall determine when an assignment or transfer is "fictitious", "colorable" or "spurious", hence improper or collusive. The trial court sustained its jurisdiction on the legal premise that the insolvency at the time of the assignment, or the failure of the corporate minutes to reflect

authorization for the assignment, or that the assignment might be voidable upon collateral attack by the creditors, did not render the assignment either improper or collusive or prevent the plaintiff from maintaining the action thereunder. In short, the trial court confined its inquiry to the validity of the transfer as between the parties, that is, between the corporation and its sole stockholder, and finding adequate consideration, went no further. The appellant takes the position that the assignment is improperly or collusively made if it is subject to attack by anyone, and contends that the assignment amounted to a partial liquidation by an insolvent corporation, which is prohibited by Colorado statute. See C.R.S. 1953, 31-31-11. He says this position is supported by Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327; and Miller & Lux, Inc. v. East Side Canal & Irrigation Co., supra.

In Lehigh Mining, stockholders of a Virginia corporation organized a Pennsylvania corporation and transferred real property located in Virginia to the Pennsylvania corporation for the purpose of conferring diversity jurisdiction upon the federal court in Virginia to entertain an asserted cause of action. The court sustained a denial of diversity jurisdiction, saying "The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose -- and no other purpose is stated or suggested -- of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction." (p. 339)

More than a decade later, the stockholders of a California corporation in Miller & Lux organized a Nevada corporation and transferred all of the assets of the Cali-

fornia corporation to it. The California corporation became the owners of all of the stock of the Nevada corporation, with full power of control in the California stockholders. A suit instituted by the California corporation in the California state court was dismissed and refiled in the federal court by the Nevada corporation, based upon diversity jurisdiction. The writer of the Lehigh case, also writing for the court in Miller & Lux, reemphasized the right and power of the resident stockholders, in either case to require the foreign corporation to reconvey the property to the resident corporation at their convenience; and that in each case, the transfer of the property was a mere sham or device to invoke federal jurisdiction.

The appellees rely on the much later case of B & W Taxi, and say that while it did not expressly overrule Lehigh, it is conceptually different. In that case, the stockholders of a Kentucky corporation organized a Tennessee corporation to which it transferred all of its assets. The Kentucky corporation was dissolved. The Tennessee corporation made new contracts similar to those held by the Kentucky corporation, and in all respects succeeded to that company's business. Suit was brought on the new contracts based on diversity of citizenship. Diversity jurisdiction was sustained, the court saying, "The succession and transfer were actual, not feigned or mere colorable. In these circumstances courts will not inquire into motives when deciding concerning their jurisdiction." The court thought the distinction between that case and Lehigh and Miller & Lux was too clear for discussion, and we agree. The obvious distinction lies in the fact that in Lehigh and Miller & Lux, the resident corporation remained in existence, and in full control of the foreign corporation, while in the Taxi case, the resident corporation was dissolved.

The appellees also seem to rely on Corabi v. Auto Racing, Inc., 264 F. 2d 784, a post-revision case involving diversity jurisdiction based upon the appointment of a

foreign administrator. The foreign administrator was appointed for the avowed purpose of invoking federal jurisdiction. The court thought the facts of that case fell outside the ruling of Lehigh and within the ambit of the Taxi case. While the reasoning is not entirely clear, it is significant, we think, that under applicable state law, a foreign administrator had standing to maintain the suit, and the decree of the probate court appointing the administrator was not subject to collateral attack. And see Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 77 A.L.R. 904. But compare Martineau v. City of St. Paul, 172 F. 2d 777, where the court, looking at state law, concluded that an administrator was without standing to maintain the suit in the state court, and therefore could not maintain it in the federal court based on diversity of citizenship.

As we view the cases, none of them control our situation. Our transaction is not merely colorable or a sham as in Lehigh and Miller & Lux. The assignment is supported by adequate consideration, and while it is infected with the self dealings of a sole stockholder with his insolvent corporation, there was nothing surreptitious or fictitious about the transaction. While it may lack the sanctions of state law which underlie the Taxi and Corabi cases, at the same time no one can say that it operates to the prejudice of any third party, including the creditors of the corporation, for whose protection state law is invoked. Indeed, if our inquiry should go so far, we may very well conclude that the assignment was for the benefit of all interested parties, except perhaps the appellants.

Certainly diversity jurisdiction should not be made to depend on whether some one can pick a legal flaw in the transaction by which jurisdiction is conferred. It should not be made to depend upon on await adjudication of the legality of the transaction under state law. All this means that the state of the law is left in the gray zone where we found it. Certainly no rule of thumb is suggested

or stated. But, after all, it is the words of a federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration. Viewed in this context, we cannot say that the assignment was either improper or collusive, or that the suit is not being prosecuted in the name of the real party in interest. The judgment is affirmed.